for

The Defense

Volume 9, Issue 10 ~ ~ October 1999

The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

CONTENTS:

Vouching, The Series Part 1: Overview and Attorney's Personal Opinions

By Donna Lee Elm
Defender Attorney - Trial Group D Supervisor

In 1935, the U.S. Supreme Court granted *certiorari* in a minor case involving forgery of bank notes; it was destined to become a landmark opinion about prosecutorial misconduct. A key State's witness, who had identified the defendant previously, had difficulty identifying him on the stand. Fuming, the prosecutor told the jury in closing:

> *[Y]ou can bet your bottom dollar she knew Berger. ... I was examining a woman that I knew knew Berger and could identify him, she was standing right here looking at him, and I couldn't say, "Isn't that the man?*

Recognizing that this invited the jury to conclude that she was pretending not to know the defendant, and that the prosecutor knew better from extraneous encounters, an outraged U.S. Supreme Court warned prosecutors "to refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). Acknowledging that the adversary system encourages a prosecutor "to prosecute with earnestness and vigor," the Court cautioned, "while he may strike hard blows, he is not at liberty to strike foul ones." *Id.* Due to the confidence jurors place in the office of the prosecutor, "improper suggestions, insinuations, and, *especially, assertions of personal knowledge* are apt to carry much weight against the accused when they should properly carry none." *Id.* (emphasis supplied). The *Berger* opinion spawned a huge body of law, sometimes sanctioning and sometimes excusing, vouching.

It was not long before the Court formally sanctioned the defense for similar misconduct. It held that, "The interests of society ... are no more to be frustrated through unchecked improprieties by defenders." *Sacher v. United States*, 343 U.S. 1, 8, 72 S.Ct. 451, 455 (1952). Hence both sides in criminal practice "share a duty to confine arguments to the jury within proper bounds." *United States v. Young*, 470 U.S. 1, 7, 105 S.Ct. 1038, 1042 (1985).

What are those "proper bounds" when arguing credibility of witnesses? Specifically, what is "vouching?" Though ethics rules are explicit and firm, commentators are quick to point out that case law is inconsistent, fact-driven, and highly protective of convictions (especially of egregious crimes). *E.g.*, Annot., Propriety and Prejudicial Effects of Comments by Counsel Vouching for Credibility of Witnesses -- State Cases, 45 A.L.R.4th 602; Annot., Propriety and Prejudicial Effects of Comment by Counsel Vouching for

Credibility of Witnesses -- Federal Cases, 78 A.L.R. Fed 23.

Ethics Rules

Arizona's ethics prohibitions of vouching are found in Arizona Rules of the Supreme Court, Rule 49, ER 3.4(e):

> A lawyer shall not ... in trial allude to any matter that ... will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, ... or the guilt or innocence of an accused.[1]

The ABA Standards for Criminal Justice, 3-5.8(a,b)(2nd ed. 1980) provide a rule just for prosecutors:

> (a) The prosecutor may argue all reasonable inferences from evidence in the record ...
>
> (b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

The commentary goes on to explain why this prohibition is necessary: "Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." Standard 4-7.8(b) provides similar restrictions just for defense attorneys:

> (b) It is unprofessional conduct for a lawyer to express a personal belief or opinion in his client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.

The ethics rules appear fairly clear, though obviously any argument must be analyzed in terms of its context. Vouching is injecting oneself (usually) as a witness either to credibility or facts outside the record to support credibility.

Case Law

Courts have categorized vouching into two basic types: "(1) where the prosecutor places the prestige of the government behind its witness; and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989) (quoting *United States v. Roberts*, 618 F.2d 530, 533-34 (9th Cir. 1980)). The Ninth Circuit explained that "The first type of vouching involves personal assurances of a witness's veracity. ... The second type of vouching involves prosecutorial remarks that bolster a witness's credibility by reference to matters outside the record." *Roberts* at 533. Arizona and many other jurisdictions have added a third type: "a lawyer is prohibited ... from asserting personal knowledge of facts in issue" unless he actually testifies. *State v. Salcido*, 140 Ariz. 342, 344, 681 P.2d 925, 927 (App. 1984).

This rule is also stated in the negative: a prosecutor's argument is *not* improper if he does *not* give a personal assurance of the witness's veracity and does *not* imply he had information not presented to the jury. *DeBruce v. State*, 651 So.2d 599 (Ala.Crim.App. 1993); *People v. Salter*, 59 Cal.App.2d 59, 137 P.2d 840 (1943).

To see how these rules are applied, the most common examples are explained below.

A. Declarations of Positions or Personal Opinions

1. Declarations of Truthfulness

> *"[The police officer] was an honest witness"*[2]
> *"Agent Thompson's story is worthy of your belief." "Every bit of testimony, ladies and gentlemen, is true."*[3]

Generally, these declarations of a party's position are considered "fairly mild," but not reversible, vouching. *United States v. Wihbey*, 75 F.3d 761 (1st Cir. 1996). In *State v. White*, 115 Ariz. 199, 203-04, 564 P.2d 888, 892-93 (1977), the last example above, the court held that it "does constitute an improper comment on the evidence of the State's witnesses but does not rise to such a level of impropriety as to require reversal." The theory was that that

for The Defense Copyright© 1999

Editor: Russ Born

Assistant Editor: Jim Haas

Office: 11 W. Jefferson, Suite 5
Phoenix, AZ 85003
(602)506-8200

for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. ***for The Defense*** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 5th of each month.

bald declaration, without a disclaimer, might suggest that it was the lawyer's own opinion, even though first person ("I think") was never used. To prevent vouching, attorneys are advised to use the disclaiming phrase, "The evidence has shown ..." beforehand.

Note that courts have held that the type of phrasing, "worthy of belief" (as in the second example above) is not even arguably a statement of the prosecutor's opinion. They reason that "worthy of belief" does not state that the attorney believed the witness nor does it discuss matters outside the record. *See, e.g., Commonwealth v. Williams*, 295 Pa.Super. 369, 441 A.2d 1277 (1982).

There is a modern view that that disclaimer is an unnecessary legalism. It finds third person declarations unobjectionable as statements of a *position* or *conclusion*. *See People v. White*, 28 Cal.Rptr. 67 (1963). Note that our former ethics rule (DR7-106(C)(4)) allows for that: "a lawyer ... may argue ... for any position or conclusion" arising from the evidence. That language was not, however, incorporated into our present Ethics Rules, though presumably it would still be considered proper. One court explained why these should not be considered statements of the attorney's personal beliefs: Although, standing alone, they sound like expressions of personal opinions, in closing argument, counsel is merely trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. *State v. Papadopoulos*, 34 Wash.App. 397, 662 P.2d 59 (1983). These arguments are equated with statements of the theory of the crime or defense (which are permitted without disclaimer), for example:

> *"My client is innocent of this crime."*
>
> *"Mr. Garza is guilty of premeditated murder."*
>
> *"It wasn't assault, it was self-defense."*

There are three Arizona cases on point. The older one, *White*, followed the older rule. But in two more recent cases, the court appears to be moving toward finding no impropriety. *See State v. Duzan*, 176 Ariz. 463, 467, 862 P.2d 223, 227 (App. 1993) (prefaced the statement with disclaimer, "the facts show"); *State v. Corona*, 188 Ariz. 85, 91, 932 P.2d 1356, 1362 (App. 1997)(though comment might be improper, prosecutor also said jury must decide credibility). Hence Arizona may be shifting to the modern view.

2. Declarations of Good Character (Third Person)

a. Declarations of Good Character in General

> *"I am proud of [the IRS agents] that work long, hard hours for these United States. They try their dead level best to see that the proper taxes are collected."*[4]
>
> *"Her past and future is clean as the new-fallen snow."*[5]
>
> *"Believe these good, clean, straight, reputable men."*[6]

These statements generally would not constitute vouching. Such argument is similar to declarations of truthfulness except it goes to other favorable character traits – so is even less objectionable than declarations of truthfulness. In the second example, the Court reasoned that whether the agents did a good or bad job was in the record and was a proper subject for argument. Courts recognize that such phrases may be used, however, to infer or suggest credibility (since otherwise, they would be irrelevant). But they generally can be attributed to admitted evidence or inferences from it, so are allowable.

There are times when declarations of good character may be impermissible for other reasons like when the specific facts argued were not contained in the record.

There are times when declarations of good character may be impermissible for other reasons like when the specific facts argued were not contained in the record. Hence arguments such as the following are improper:

> *"Counsel would want you to believe Jones came up here and deliberately lied. I want to say to you, my friends, that I knew Frank Jones' father and mother before Frank Jones was ever born - clear back in 1898 – I worked with Frank Jones' father - and I know that boy - I know his family -."*[7]
>
> *"Now Gentlemen, these fine officers, Bob Ashmore and Murray Chapman, who are not only two examples of fine officers, but two examples of fine citizens and fine men."*[8]
>
> *"I know the deputy sheriff to be a good man, as good an officer as there is in the county."*[9]

These declarations of good character would have been permissible – except that the information being alluded to was not in the record.

A federal court also acknowledged that the following summation about an FBI agent's willingness to get involved, was not improper vouching:

> *"It tells you ... something about his sense of duty. It tells you he cared, that he gave a damn, that he got himself involved. He didn't wait or let someone else worry about it. ... He should be commended. That he shouldn't be criticized; he should be applauded. And he shouldn't be embarrassed or humiliated. He should be proud, and you should be proud of him."*

United States v. Kirvan, 997 F.2d 963 (1st Cir. 1993). The court concluded that, though the argument was not vouching, it was "inappropriate cheerleading." Nonetheless, the Court held it was not plain error.

Use of the first person ("I" statements) signals classic vouching. As a general practice, attorneys should avoid, even innocently, using the first person in argument because of this danger.

b. Declarations of Religious Good Character

> *"You would have to believe that the grandmother, Cheryl and Lisa, uprighteous, religious, moralistic type people, all got together and concocted up a scheme, a scheme that involves almost criminal activity, to have Mr. Thomas suffer a conviction."*[10]

> *"He went to church faithfully; he knew what it meant to take an oath before God."*

> *"I know this man of God told you the truth, he is on God's side, gentlemen, and God is on his."*[11]

Though statements like these above would seem to fall under the rubric of harmless "good character" argument, invoking religion is never proper. The Arizona Constitution expressly forbids reference to a witness's religion in deciding cases:

> [N]or shall any person be ... questioned on matters touching on her religious belief in any court of justice to affect the weight of his testimony.

Art. 2, §12. The federal and Arizona Rules of Evidence agree. Rule 610 provides:

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

Consequently, Arizona courts have not hesitated to intervene when attorneys vouch for a witness's credibility by referring to their religious beliefs. In *State v. Marvin*, 124 Ariz. 555, 606 P.2d 406 (1980), the defense attorney's argument that the defendant was Mormon was improper because it was intended to bolster his credibility. *See also State v. Thomas*, 130 Ariz. 432, 636 P.2d 1214 (1981). Moreover, though it is not improper to ask witnesses if they understood their oath, questioning them about their belief in God (regarding the oath) would be improper vouching. *E.g.*, *People v. Wells*, 82 Mich.App. 453, 544, 267 N.W.2d 448, 449 (1978) (cited in *State v. Thomas*, 130 Ariz. 432, 636 P.2d 1214 (1981)); *Commonwealth v. Fawcett*, 297 Pa.Super. 379, 443 A.2d 1172 (1982).

Note, too, that when a deity is invoked, that could vouch in another way. For example,

> *"He is a God-fearing Jew, one of God's chosen."*

> *"She loves Jesus and is part of the flock."*

These suggest that a higher being -- the ultimate in truth deciding -- has blessed the witness's testimony. It is third party vouching, and is always improper.

3. Declarations of Truthfulness or Personal Opinion (First Person)

> *"I think it's a fraud."*[12]

> *"And I don't think Mary was up there lying to you. I don't think she ever lied to you. ... The State believes she was telling the truth."*[13]

> *"I am telling you that they are telling you the truth."*[14]

> *"For what it is worth, I am morally convinced that he is guilty beyond a reasonable doubt."*[15]

Use of the first person ("I" statements) signals

classic vouching. As a general practice, attorneys should avoid, even innocently, using the first person in argument because of this danger. The "I" statements above are highly improper because they make the attorney an unsworn witness, convey information outside the record, and bolster the credibility of the witness. Arizona case law is firm that such personal opinion statements are improper. *E.g.*, *State v. Dillon*, 26 Ariz.App. 220, 547 P.2d 491 (1976)(personal opinion of witness's veracity); *State v. Moreno*, 26 Ariz.App. 178, 547 P.2d 30 (1976)(personal opinion of detective's credibility); *State v. Dunlap*, 187 Ariz. 441, 930 P.2d 518 (App. 1996)(personal opinion that Adamson justifiably sought a better plea agreement).

There are circumstances, however, where "I" statements are not construed as vouching. For example, an isolated reference to an insignificant matter is meaningless verbiage. *Ex Parte Reiber*, 663 So.2d 999 (Ala. 1995). Additionally, when a prosecutor argued that he did not think the victim had lied to the jury, though he used "I" phraseology, he was not putting his reputation behind the witness. *People v. Bragg*, 68 Ill.App.3d 622, 386 N.E.2d 485 (1979). In an Arizona case, the court concluded that the following argument, rife with "I" declarations, was not vouching:

> *"Now she's been, I think, honest when she says she was not aware that other witnesses had seen her. ... I think he was an honest man, certainly an honest man, but I think he made an honest mistake."*

State v. Lee, 185 Ariz. 549, 917 P.2d 692 (1996). The "I think" repetitions are meaningless as used here, functioning more like the phrase, "you know...". The court decided that the prosecutor never placed the prestige of the government behind the witnesses. This aberrant conclusion is consistent with another case which explained the rationale better; in *People v. Bailey*, 186 Ill.Dec. 488, 616 N.E.2d 678 (App. 1993), "I think" and "I believe" arguments were conclusions drawn from evidence in the record, not extraneous to it, so were not improper.

In addition, if the "I" statement is made in the context of the evidence, especially where the disclaimer, "the evidence has shown" is applied, courts usually do not reverse or even consider the argument improper. For example, in *State v. Duzan*, 176 Ariz. 463, 466, 862 P.2d 223, 226 (App. 1993), the prosecutor argued that the defendant was scheming and manipulative, instructing:

> *"I stand before you and tell you that she is."*

The Court of Appeals found this improper but in part upheld the verdict because the argument was preceded by "the facts showed ...". *Id.* at 467, 862 P.2d at 227. However, there was another, more substantial ground for permitting this argument, namely that it came as an "invited response." *Id.*

Courts in several other states rely on the disclaimer heavily to excuse even gross personal opinion argument. For instance, Oklahoma permits vouching as long as the prosecutor states that his opinion is based upon what the evidence showed. *E.g*, *White v. State*, 498 P.2d 421 (Ok.Crim. 1972).

Where does Arizona fall regarding use of the disclaimer? Although *Duzan* seems to endorse that practice, generally our appellate courts are pragmatic. They do not favor legalisms or "magical language" that allows really unfair tactics; form seldom governs substance. Although *Duzan* recognizes the efficacy of using a disclaimer, the holding probably rested more on the "invited response" doctrine, so reference to the disclaimer is bad practice and likely made bad law.

In addition, if the "I" statement is made in the context of the evidence, especially where the disclaimer, "the evidence has shown" is applied, courts usually do not reverse or even consider the argument improper.

Finally, though "I" statements are normally considered improper, the same cannot be said for "We" statements. A "we" declaration (first person plural) was referred to as "an unfortunate word choice rather than an expression of personal opinion" in an Arizona case. *See State v. White*, 115 Ariz. 199, 203-04, 564 P.2d 888, 892-93 (1977). Moreover, in *United States v. Lahey*, 55 F.3d 1289 (7th Cir. 1995), the prosecutor's repeated use of "we know ..." did not imply that he possessed additional evidence not before the jury; instead, he was arguing what evidence "we" heard during trial. Furthermore, in *United States v. Williams*, the judge reasoned that there was no indication that "we" referred to anyone outside of those gathered in the courtroom. 583 F.2d 1194 (2nd Cir. 1978). Hence, "we" (first party plural) statements usually are not considered vouching.

---

[1] This rule was originally based on the ABA Model Code of Professional Responsibility, DR 7-106©(3,4) (1980), that warns that a lawyer must not:

> (3)Assert his personal knowledge of the facts in issue, except when testifying as a witness.
> (4)Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to culpability of a civil litigant, or as the guilt of innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to matters stated herein.

[2] United States v. Weinrich, 586 F.2d 481, 496 (5th Cir. 1978).

[3] State v. White, 115 Ariz. 199, 203, 564 P.2d 888, 892 (1977).

[4] United States v. Hiett, 581 F.2d 1199, 1204 (5th Cir. 1978).

[5] People v. Harris, 47 Cal.3d 1047, 767 P.2d 619 (1989)

[6] State v. Bass, 93 N.H. 172, 37 A.2d 7 (1944)

[7] State v. Holdaway, 56 Nev. 278, 48 P.2d 420 (1935).

[8] Womack v. State, 160 Tex. Crim. 237, 237, 268 S.W.2d 140, 140 (1954)

[9] Adapted from Parker v. State, 124 Tex. Crim. 600, 64 S.W.2d 786 (1933).

[10] State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981).

[11] McGhee v. State, 41 Ala.App. 669, 149 So.2d 1 (1962).

[12] United States v. Young, 105 S. Ct. 1038, 1041, 470 U.S. 1, 5 (1985).

[13] State v. King, 110 Ariz. 36, 514 P.2d 1132 (1973).

[14] Puckett v. State, 168 Tex.Crim. 615, 330 S.W.2d 465 (1959).

[15] People v. Castello, 264 N.Y.S.2d 136 (1965).

■

¿SE HABLA EL ESPAÑOL? !A VECES NO!:[1] PUTTING "CERTIFIED" SPANISH-SPEAKING OFFICERS TO THE TEST.[2]

By: Mike McCullough
Defender Attorney

The situation has no doubt presented itself before, and will certainly re-occur soon enough. You find yourself reviewing a file, and note casually that your client is a Spanish-speaker. You then have the pleasure of reading the police report. It summarizes in excruciating detail how police officers legitimately contact your client, lawfully arrest him, and have numerous credible witnesses and substantial evidence to convict.

Worst of all, the report will describe an interrogation by a "certified" Spanish-speaking officer. Unfortunately, it will be somewhat like this:

Q: Do you wish to speak to me?
A: It would be my pleasure to waive my rights and speak to you.
Q: What did you just do?
A: I knowingly or intentionally committed the crime for which you arrested me.
Q: This mountain of evidence that we just found, how did we find it?
A: I knowingly consented to a search.
Q: Do you have any defenses?
A: None whatsoever.
Q: Are you guilty beyond a reasonable doubt?
A: Absolutely.

You sit back in your chair and sigh. But all may not be lost. At least, not yet. There may still be issues with regard to the admissibility of your client's statements. By challenging the officer's abilities in Spanish, you can establish grounds for (1) a preclusion of the officer's "expert" testimony as to what your client allegedly said, and (2) a *Miranda* challenge.[3] From the beginning of your case preparation, you should lay the groundwork for these possible challenges to any and all client statements in Spanish which you would like to preclude or suppress.

During the interview, question extensively on the language issue. Your questions will have a dual focus: how the officer knows what was said, and what the officer claims was said.

First, conduct a taped interview of the officer who reported the statements, just as with any witness. During the interview, question extensively on the language issue. Your questions will have a dual focus: how the officer knows what was said, and what the officer claims was said.

Begin by asking open-ended questions about the officer's qualifications to translate between English and Spanish, just as you would with any other purported expert. Follow up with specific inquiries concerning the following: the officer's formal education in Spanish (how many years, degrees, if any, etc.), amount of time spent speaking the language informally (growing up as a child, with family or friends since, how often and in what contexts), and the process of becoming certified (how many attempts, and the actual procedure for becoming certified[4]).

Then, have the officer repeat all questions asked of your client, and your client's answers, *in Spanish*. Make it very clear that you want the officer to repeat the actual interrogation, *verbatim*, if possible, as it occurred *in Spanish*, and that you do not want the officer's English interpretation. You may also want to have the officer tell

you how he read the client his *Miranda* rights in Spanish. Even if the officer tells you he read straight from the card, or never read the client his rights, you will still want him to recite a suspect's *Miranda* rights, in Spanish, from memory. If nothing else, this is one more opportunity to assess the officer's Spanish-speaking abilities. Even a rookie officer should be able to recite *Miranda* rights from memory, and any legitimate Spanish-speaking officer should be able to then translate those rights to Spanish without difficulty.

The goal is to put the officer through his paces in the interview. The important thing is to be thorough, as you are setting up a possible challenge to the officer's language credentials. During the interview, the officer may try to backpedal and claim that he cannot recall what was said *verbatim*. If so, simply have the officer translate what he wrote in the report as the summary of his questions and your client's statements. If the officer wrote no such summary, have him recall the questions and answers to the best of his ability, and then translate into Spanish what he recalls. You are not concerned with getting a transcript at this point. Rather, you are developing a comprehensive sample from which you or someone else can assess whether the officer is really qualified. For these purposes, asking the officer to translate several paragraphs from an article in the day's paper could be just as effective.

The goal is to put the officer through his paces in the interview. The important thing is to be thorough, as you are setting up a possible challenge to the officer's language credentials.

Some of you may be saying, "My knowledge of Spanish is limited to '*¿Cuánto cuesta la cerveza?*' How can I challenge someone else's knowledge of Spanish?" First, regardless of your abilities in Spanish, you will know when an officer is not up to the challenge. A truly competent Spanish-speaker should be willing to humor you and recite the dialogue in Spanish, and may even enjoy showing off. If you sense reluctance on the officer's part, you may be on to something. Second, if you come away from the interview with any doubt as to the officer's abilities, but cannot assess them for yourself, you can always play the relevant portion of the tape to someone who is proficient in Spanish. Our office has a number of bilingual people on staff, who should be willing to offer their expertise from time to time.

Next, once you have a good sample, and you or some other qualified person has determined that the officer's Spanish interpretation skills may be lacking, you will need a professional opinion. You should send the interview tape and any relevant reports to the Office of the Court Interpreter (OCI).[5] OCI can then listen to the tape and tell you whether the officer could be considered an expert for testimonial purposes. If OCI tells you that the officer is not qualified, you can try to keep out your client's statements.

Obviously, if an officer's linguistic abilities are in question, his testimony concerning what he said to the client, and more importantly, what the client supposedly said to him, are both in question. If you have such an issue, you are finally ready to challenge the admissibility of your client's statements on two fronts: a Motion to Preclude Officer's "Expert" Testimony,[6] and a Request for a Voluntariness and Miranda Hearing.[7]

In a Motion to Preclude Officer's "Expert" Testimony, you are simply arguing that the officer lacks the necessary qualifications to testify as an "expert." Specifically, you are arguing that the officer must qualify as an expert, since translation is beyond the abilities of the average layperson, that in OCI's opinion the officer is not qualified to testify as an expert, and therefore, the officer must be precluded from testifying as to what your client allegedly said. It bears emphasizing, however, that neither you nor OCI will be asking the court to hold the officer to the same standard as a court interpreter or equivalent professional. The only issue will be whether the meaning of any exchange was successfully conveyed. Emphasize to the court, then, that you are simply holding the officer to the standard of expertise necessary for proper communication with the client and accurate relay of the dialogue to the jury. This, of course, is a sliding scale, which is raised or lowered depending on the complexity of the subject matter of the statements.

At a hearing on the motion, you can cross-examine the officer on the deficiencies established by you during the interview, or by the officer in the report. More importantly, however, you will call your own expert, the OCI representative. The OCI witness will testify as to their own background, their own qualifications, their professional opinion as to why the officer is not qualified to testify on the subject, and the various bases for that opinion.[8] At that point, the judge should recognize that there is a problem, and preclude the officer from testifying as to any client statements.

Admittedly, the *Miranda* issue may be more of a challenge. In most cases, the officer will probably claim to have read the client's rights from the standard issue card. And even the officer with the most rudimentary knowledge of Spanish may be able to convince a judge that they were able to successfully convey the necessary warnings. But

not necessarily. Without doubt, there are officers whose abilities are so limited that even a *verbatim* reading of the card is insufficient advisement. In the rare case, you will argue that the officer's accent or ability to read in Spanish was so poor as to effectively nullify their *Miranda* advisory. Imagine being read your rights in a foreign country by an officer incapable of reading well in English, and you can see the problems. If OCI can testify that because of the officer's poor Spanish accent, or inability to read in Spanish, the advisement was insufficient, the judge should see the same problems.

This approach is no silver bullet. Unfortunately, it will not allow us to keep out statements on any consistent basis. But even if the court denies a motion to preclude the officer's testimony, or a *Miranda* motion, you are not finished. If your OCI witness informs you that there is a legitimate question concerning the officer's abilities, and that there was a true miscommunication, you can always present such testimony at trial for the jury's benefit.

Some officers, of course, are truly bilingual. You may encounter such officers in your interviews. Or, more commonly, you may find that an officer knows enough to testify to simple statements, e.g., your client's brief confession, or a brief drug transaction in which the only words exchanged were "*Piedra*," "*¿Cuánto?*," and "*Veinte.*" Again, the standard is a flexible one, depending on the complexity of the dialogue. But for your more complicated cases, the mere fact that the officer studied some Spanish in high school, or has family from Mexico, should not, without more, establish expertise.

A growing number of our clients are Spanish-speaking. More and more, officers interacting with them should be bilingual. And increasingly, they are claiming to be. But fair and accurate translation of statements is difficult. Consequently, whether an officer is truly qualified should, and must, be a subject of legitimate concern. So, as the ranks of "certified" Spanish-speaking officers swell, we must be more aware of these issues, and more aggressive in holding these officers to high standards. We must be conscious of the fact that inside and outside the courtroom, qualifications can be nothing more than a façade. In other words, a dose of healthy skepticism is in order. If nothing else, in dealing with "certified" officers, we should bear in mind the Spanish saying, "Tell me what you claim to be, and I'll tell you what you're lacking."[9]

---

[1] "Do They Speak Spanish? Not Always!"

[2] This is not a new idea. Our office has previously made similar challenges. The article is simply a proposal for a more unified, aggressive approach, and may affirm what many of you are already doing in these cases.

[3] This article concerns itself with the most common scenario of Spanish-speaking clients and "certified" Spanish-speaking officers. However, its concepts should be just as applicable to situations involving *any* witness who claims to be able to interpret statements by *any* third party in *any* language. For example, if the government intends to call a nurse to hearsay in a victim's dying declaration in Vietnamese, implicating your client, you should obviously challenge the nurse's abilities in Vietnamese.

[4] The Phoenix Police Department's procedures for certification appear to be informal, and not particularly rigorous. Apparently, the officer applies to become certified, and sits before a three-member panel of other "certified" officers for a brief oral exam. This, of course, raises the potential for a "garbage in – garbage out" scenario, in which unqualified officers may validate other officers who may be totally incompetent. The author has heard anecdotal evidence of only a single officer who applied to be certified, and was not. It would appear, then, that either nearly all officers who have applied are exceptionally well-qualified (unlikely), or the bar for certification has been set extremely low.

[5] Preferably, having indicated the relevant portions of the reports and tape.

[6] A sample Motion to Preclude Officer's "Expert" Testimony may be found on the s-drive at *.

[7] A sample Request for a Voluntariness and Miranda Hearing, relevant to issues involving "certified" Spanish-speaking officers, may be found on the s-drive at *.

[8] By law, *court* interpreters are required to qualify as experts. Laying the foundation for their opinion is probably unnecessary. No judge is likely to call into question the competence of the very people who serve as interpreters in their court day in and day out. However, since their qualifications and abilities are impressive, testimony concerning these qualifications will often make the officer's "qualifications" look underwhelming by comparison.

[9] *"Dime de que pregonas, y te diré de que careces."*

GRANDSON OF JOEL: The FAQs of Life in Juvenile Appellate Practice

By Joel Glynn
Defender Attorney - Appeals

Dear Reader,

You haven't heard from me for awhile, but I certainly heard from you. You flooded my mailbox, voice-mail, and fax-machine with a new generation of questions about appellate practice under our relatively new Arizona Rules of Procedure for the Juvenile Court.

The Arizona Rules of Procedure for the Juvenile Court ("RPJC") were amended on January 1, 1998. RPJC 24 through 29 specifically deal with appellate procedures. You may recall that I wrote two articles about juvenile appellate procedure and likened two generations of

questions to the old Universal Picture horror movies "Frankenstein", "Son of Frankenstein", "Dracula", "Son of Dracula", "King Kong" and my personal favorite "Son of Kong". Well, the producers of those wonderful Universal pictures would be jealous now, because I am doing something now that they didn't do. I'm going beyond "Joel" and "Son of Joel" and am proud to announce that there is a "three-quell" to "Joel". Ladies and gentleman, please meet my new generation of top-ten "questions and answers" entitled, "Grandson of Joel".

QUESTION #TEN: I know that a juvenile has fifteen (15) days after the disposition hearing to file a Notice of Appeal. When does that 15-day period begin to run?

I need to review this question with you.

A juvenile's right to appeal is authorized under RPJC 25. A *Notice of Appeal* must be filed "no later than 15 days after the final order [of the juvenile court judge/commissioner] is filed by the clerk. RPJC 25(a). The "final order" for purposes of RPJC 25(a) is usually the disposition order, if there is no issue of restitution. If there is no issue of restitution, a *Notice of Appeal* filed not later than 15 days after the signed disposition order is filed is timely as to both the adjudication order and the disposition order. However, if there is a restitution order, the restitution order becomes the "final order" for purposes of RPJC 25(a) and the *Notice of Appeal* must then be filed no later than 15 days after the written restitution order is signed by the judge/commissioner **and** filed by the clerk. *In re Eric L.*, 189 Ariz. 482, 943 P.2d 842 (App. 1997). Under this scenario, the *Notice of Appeal* would be timely as to (1) the adjudication order, (2) the disposition order, and (3) the restitution order. In re Eric L., supra. Therefore, do not file a *Notice of Appeal* if the issue of restitution remains an open question and/or a restitution hearing is set in the future. Wait until the clerk of the superior court files the signed written restitution order before you file a Notice of Appeal.

The Presiding Juvenile Court Judge will rule on the *Motion to Excuse Untimely Notice of Appeal*. RPJC 29(b). The ruling could be made on the pleadings, after oral argument, or after an evidentiary hearing.

Remember, the "final order" must be in writing and signed by the judicial officer. It makes no difference whether the "final order" comes in the form of a minute-entry or a separate written order prepared by counsel. RPJC 25(a). The significant date is not the day that the judge or commissioner actually signs the order or the date that appears at the top of the minute-entry. Rather, the important event is the filing date. "Filing with the clerk" takes place when the clerk (1) affixes a file stamp on the signed minute-entry or separate written order; or (2) marks the date of filing on the signed minute-entry or separate written order; or (3) separately memorializes the date of filing in the clerk's official records. RPJC 25(a). Consequently, a written order is not final for purposes of RPJC 25(a) if a busy courtroom clerk, for example, mistakenly files an unsigned minute-entry or written form of order. If that happens in your case, I suggest that you immediately contact the assigned judge/commissioner's judicial assistant or courtroom clerk, explain that the order is deficient, and request that the assigned judge/commissioner sign a new order. This will demonstrate "due diligence" on your part in the event that the timeliness of your client's *Notice of Appeal* is ever called into question.

QUESTION #NINE: What happens if I file a Notice of Appeal after the 15-day period has run? Can I ask for a delayed appeal and where do I file my pleading?

If you're late, you can still ask for a delayed appeal in juvenile court. However, you will have to do some extra leg-work. Don't look to the adult post-conviction relief procedures, *a la* PCR (See, Rule 32.1(f), Arizona Rules of Criminal Procedure) for guidance. They don't apply for two reasons: (1) the Arizona Rules of Criminal Procedure do not apply to juvenile proceedings (*State v. Berlat*, 146 Ariz. 525, 707 P.2d 303 (1985); *In re Appeal in Maricopa County Juvenile Action No. 86715*, 122 Ariz. 300, 594 554 (App. 1979); *In re Appeal in Yavapai County Juvenile Action No. 7707*, 25 Ariz. App. 397, 543 P.2d 1154 (1975)); and (2) RPJC 25(a) and 29(a) now provide a procedure whereby an appeal that appears untimely can be quickly addressed.

As soon as you discover that you filed the *Notice of Appeal* late, immediately file a *Motion to Excuse Untimely Notice of Appeal* or its equivalent with the clerk in juvenile court. Attach an affidavit to the motion, explaining why the failure to file a timely *Notice of Appeal* was the result of "excusable neglect". RPJC 29(b). You must also show that you acted with "due diligence". In other words, you acted as soon as you discovered the error.

"Excusable neglect" has been defined as "reasonable and foreseeable neglect or inadvertence." A.R.S. 12-821(A); *Pritchard v. State*. 161 Ariz. 450, 778 P.2d 1346 (App. 1989). The standard for determining whether conduct is "excusable" is whether the neglect or inadvertence is such as might be the act of a reasonably prudent person under the same circumstances. *City of Phoenix v. Geyler*, 144 Ariz. 323, 697 P.2d 1073 (1985); *Coconino Pulp and Paper Company v. Marvin*, 83 Ariz. 117, 317 P.2d 550 (1957). If your reason(s) include (1) I

didn't know about the time-limit to file a notice of appeal (*cf. Ellman Land Corporation v. Maricopa County*, 180 Ariz. 331, 340, 884 P.2d 217, 226 (App. 1994)); or (2) I waited to receive the court's signed minute-entry or order, before I filed a Notice of Appeal (*M & M Storage Pool, Inc. v. Chemical Waste Management, Inc.*, 164 Ariz. 139, 791 P.2d 665 (App. 1990); don't hold your breath for a favorable ruling.

The Presiding Juvenile Court Judge will rule on the *Motion to Excuse Untimely Notice of Appeal*. RPJC 29(b). The ruling could be made on the pleadings, after oral argument, or after an evidentiary hearing.

QUESTION #EIGHT: Do I need to file a second Notice of Appeal after the Presiding Juvenile Court Judge grants my Motion to Excuse Untimely Notice of Appeal?

No. RPJC 29(b) empowers the Presiding Juvenile Court Judge only to excuse the untimely filing of a Notice of Appeal. If you have already filed a Notice of Appeal, a determination that the untimely filing was the product of excusable neglect is implicit in the court's ruling on your motion. The Presiding Juvenile Court Judge therefore lacks authority to require the filing of a new (second) Notice of Appeal on or before a future date.

QUESTION #SEVEN: When the Court of Appeals renders a decision, affirming the orders of the juvenile court, where do I file a Petition for Review and how much time do I have to file it?

The Petition for Review should be filed with the clerk of the Court of Appeals with thirty (30) days "after the clerk of the court of appeals has given notice that a decision disposing of the appeal has been rendered". RPJC 28(a). In other words, the Petition for Review must be filed within 30 days of the date of the Court of Appeals' decision. Like the 20-day time period to file the opening brief (See RPJC 27(b)(1)); the 30-day deadline to file the Petition for Review is not extended by an extra five (5) days to compensate for the mailing of the Court of Appeals' decision.

QUESTION #SIX: If I can't file a Petition for Review within the 30- day period, is it possible to get an extension of time and where do I file the motion to extend the time for filing a petition for review?

It is now possible to get an extension of time to file a petition for review. Motions to extend the time for filing a petition for review shall be filed in and determined by the Court of Appeals. RPJC 28(j). This change brings RPJC 28 into harmony with a similar provision in the criminal appellate rules. See, R.Crim.P. 31.19(j). However, any motion to extend the time for filing a cross-petition for review shall be filed in and determined by the Arizona Supreme Court. RPJC 28(j).

QUESTION #FIVE: I recently represented a client in a delinquency matter in juvenile court. Many exhibits, including videotape, were admitted into evidence at the adjudication hearing. Is the videotape automatically included in the record on appeal?

Arguably, no. RPJC 25(d)(1) defines the record on appeal:

(I) a certified copy of the transcript;

(ii) a certified copy of all pleadings, orders, and other documents filed with the clerk of the superior court; (iii) the originals of all paper, book, binder, and photographic exhibits of manageable size introduced into evidence; and

(iv) documents and other items added pursuant to subsection (e) or (f)(1) of this rule.

According to one interpretation, videotape is not a "photographic exhibit" for purposes of RPJC 25(d)(1)(iii) and is therefore not automatically included in the record on appeal.

According to one interpretation, videotape is not a "photographic exhibit" for purposes of RPJC 25(d)(1)(iii) and is therefore not automatically included in the record on appeal. This is despite the fact that the videotape was admitted into evidence and considered by the judge or commissioner. The Arizona Rules of Procedure for the Juvenile Court provide a method to include this exhibit in the record on appeal. In order to include the videotape as an exhibit on appeal, you must file a *Designation of Record* form not later than five (5) days after the *Notice of Appeal* is filed. RPJC 25(e). In that form, you must identify the videotape as an exhibit that you want to add to the record on appeal. I also suggest that you identify the exhibit number of the videotape and the date that it was admitted into evidence. File the *Designation of Record* with the clerk of superior court. If you discover that a Designation of Record form was filed by previous counsel, but that the form failed to list the video-tape as an exhibit to be added to the record on appeal, immediately file an *Amended Designation of Record* form with the clerk of the superior court and identify the video-tape by name and exhibit number and the date that it was admitted into evidence. The clerk will then send the videotape to the Court of Appeals and, *voila*, you will be able to watch the movie at the Court-of-Appeals' Cinema in a few days.

QUESTION #FOUR: Is there any other method that I can use under the Arizona Rules of Procedure for the Juvenile Court to add the videotape to the record on appeal?

Yes. RPJC 26(g) allows you to move the Court of Appeals "to direct the transmission of any document, exhibit or other item necessary to determining the appeal and not transmitted under Rule [RPJC] 26(d)." The videotape seems to qualify under this rule, because the videotape was admitted into evidence and considered by the judicial officer. However, your calendar and the circumstances of your case may make RPJC 25(e) the more attractive method to use to add the videotape to the record on appeal.

Our appellate courts give juvenile appeals precedence over all other actions, except extraordinary writs or special actions. RPJC 24(c). The Arizona Rules of Procedure for the Juvenile Court also promote the expeditious progress of juvenile appeals toward finality. RPJC 24(c). In fact, the time needed to assemble the record on appeal and the parties' briefing schedule is designed to reduce an appeal's travel time from the filing-date of the *Notice of Appeal* to when the juvenile's appeal is deemed "at issue". This should be your approach too. Your appellate caseload may be such that you can't afford to be hamstrung by the unavailability of an exhibit like the videotape, because you may have many due-dates that all seem to fall on the same day. You may not have even represented the juvenile in juvenile court or caused the *Notice of Appeal* and the deficient *Designation of Record* to be filed on the juvenile's behalf. A motion filed under RPJC 26(g) may be too time-consuming, because it takes time for the Court of Appeals to rule on a motion and it takes time for the clerk of the superior court to comply by sending the exhibit to the Court of Appeals. Too many motions, including motions for extension of time to file appellate briefs (RPJC 24(c)), only delays the inevitable and really sets an attorney up to deal with a wave of cases later. It reminds me of Leslie Nielson as the captain in the "Poseidon Adventure". You remember when he stood on the bridge of his ocean-liner, looked out the window one night, and saw the enormous wave poised to crush his ship. No one wants to be in that predicament, including me. I don't want to be called "Leslie". Consequently, I view the RPJC 25(e) method as the better approach. It achieves the result more quickly and eliminates the need to file a motion for extension of time to file the opening brief when you discover that the video-tape is not part of the record on appeal and the opening brief is due in a couple of days.

A motion filed under RPJC 26(g) may be too time-consuming, because it takes time for the Court of Appeals to rule on a motion and it takes time for the clerk of the superior court to comply by sending the exhibit to the Court of Appeals.

QUESTION #THREE: The juvenile decides to dismiss his appeal after the Notice of Appeal was filed. What procedure do I use to dismiss the appeal and does it make any difference whether the juvenile decides to dismiss the appeal after the opening brief or the reply brief was filed?

You can move to dismiss the appeal at any stage. However, you have to do more than merely file a written *Motion to Dismiss Appeal*.

RPJC 24(g) provides that certain sections of the Arizona Rules of Civil Appellate Procedure ("ARCAP") apply to appeals from final orders of the juvenile court. ARCAP 22 (Voluntary Dismissal) is one of those sections.

A written *Consent to Dismiss Appeal* form should accompany your Motion to Dismiss Appeal. The Consent form should reflect that the juvenile wishes to dismiss his/her appeal, that you have discussed the case and reasons for the dismissal with the juvenile, and that the juvenile understands that he/she can not resurrect the appeal or the issues, once the appeal is dismissed. The juvenile's dated signature must appear on the Consent to Dismiss Appeal form.

QUESTION #TWO: Is counsel subject to sanctions under ARCAP 25 and RPJC 25(g) when he files an appeal in compliance with *Anders v. California* (Anders Brief), 386 U.S. 738 (1967) and adds items to the record on appeal that, in hindsight, are not essential to deciding the issues presented by the appeal?

RPJC 25(g) provides that no party shall request that any item be added to the record that is not essential to deciding the issues presented by the appeal. RPJC 25(g) also authorizes the appellate court to impose sanctions for counsel's failure to comply with this rule. What happens then, when appellate counsel inherits the case from another attorney who not only o represented the juvenile in juvenile court, but also filed the *Notice of Appeal* or *Designation of Record* with the clerk of superior court? This may be problematic, if trial counsel and appellate counsel disagree on the merits of the issue(s) to be raised on appeal.

ARCAP 25 (Sanctions for Delay or Other Infractions) applies to appeals from final orders of the juvenile court. RPJC 24(g). ARCAP 25 authorizes the appellate court to impose sanctions against any party who files a frivolous appeal. There is a limit, however, to the applicability of ARCAP 25. ARCAP 25 does not "permit the imposition

of sanctions against a juvenile appellant or cross-appellant for filing a frivolous appeal from a final order in a delinquency or transfer matter." RPJC 24(g). This provision recognizes that a juvenile's first appeal in a delinquency case is a matter of right (*State v. Berlat,* 146 Ariz. 505, 508, 707 P.2d 303, 306 (1985)) and that no restrictions are similarly imposed on the exercise of an analogous right in adult criminal matters or on the scope of appellate counsel's advocacy in such cases. *Cf. In re Appeal in Maricopa County Juvenile Action No. JV-117258, 163 Ariz. 484, 788 P.2d 1235 (App. 1989).*

This same logic should apply to whether sanctions should be imposed against a juvenile or appellate counsel, when items are added to the record on appeal vis-a-vis a timely filed Designation of Record. The Designation of Record must be filed within five (5) after the Notice of Appeal is filed with the clerk of superior court. RPJC 25(e). This is not a great deal of time. If new counsel represents the juvenile on appeal (which is generally the case); hindsight and legal research might dim the glamour of trial counsel's prospective issue on appeal and reveal the improvidence of adding an item (transcript or exhibit) to the record on appeal through the Designation of Record. The notion that a juvenile's initial appeal is a matter of right should likewise require appellate consideration of all exhibits, even when the juvenile's appeal is deemed frivolous according to Anders v. California.

The notion that a juvenile's initial appeal is a matter of right should likewise require appellate consideration of all exhibits, even when the juvenile's appeal is deemed frivolous according to Anders v. California.

QUESTION #ONE: Following an adjudication of delinquency, the juvenile was committed to the Arizona Department of Juvenile Corrections until the juvenile reached 18 years of age. While his juvenile case was pending on appeal, he was found guilty of a felony in adult court and placed on probation for an offense committed before the disposition hearing in the case on appeal. Must the juvenile still serve the balance of the term of commitment at the Arizona Department of Juvenile Corrections?

No. The juvenile must be discharged from the jurisdiction of the Department of Juvenile Corrections, once the juvenile is convicted of a felony in adult court. A.R.S. '41-2820(C).

This ends our inquires for the time being. But who knows what the future may hold, perhaps "Great Grandson of Joel."

■

Arizona Advance Reports

By Steve Collins
Defender Attorney - Appeals

State of Arizona v. Hutt, 303 Ariz. Adv. Rep. 35 (CA 1, 8/31/99)

The trial judge found the bias of the alleged victim and the breach of an agreement between him and defendant "go to the heart of the offense and are tantamount to the defense in this matter." Therefore, the trial judge ordered the alleged victim to submit to an interview by defense counsel, because otherwise defendant would be denied the "constitutional guarantees of due process."

The Court of Appeals reversed. It held the Arizona Victims' Bill of Rights prohibits the granting of the interview.

The dissenting judge found the trial judge "made a determination that the majority concedes, at least in principle, she may make: The federal right to a fair trial may require in a particular case that a victim interview be permitted despite the state constitutional ban." The Court of Appeals "and the Arizona Supreme Court have previously said that federal due process and trial rights may supersede the state provision."

State v. Jones, 303 Ariz. Adv. Rep. 9 (CA 1, 9/2/99)

Defendant was placed on intensive probation with jail time. Later, while still on probation, he was convicted of possession of marijuana, a class 6 undesignated felony. This was an automatic violation of probation.

On the original charge, defendant was reinstated on intensive probation and given additional jail time. The prosecution appealed, contending the trial judge was under the erroneous belief that A.R.S. Section 13-901.01 (Proposition 200) would not allow her to sentence defendant to prison.

The prosecution argued that "intensive probation" implicitly allows for imprisonment when there is a violation. The Court of Appeals rejected this argument.

State v. Leon, 303 Ariz. Adv. Rep. 7 (CA 2, 8/31/99)

Defendant was on probation for felony disorderly conduct for recklessly handling a deadly weapon.

However, the offense was not designated as dangerous.

Defendant was then convicted of attempted murder in the first degree, aggravated assault and two counts of endangerment. The trial judge imposed the maximum sentence pursuant to A.R.S. Section 13-604.02(A), which governs imprisonment for crimes committed while on release for a prior felony conviction involving the use of a deadly weapon.

Defendant argued this was improper because the prior felony had been designated as non-dangerous. The Court of Appeals held the designation as "dangerous" or "non-dangerous" applied only to A.R.S. Section 13-604 and did not apply to Section 13-604.02(A). Therefore, the trial judge's ruling was upheld.

State v. Quintana , 303 Ariz. Adv. Rep. 5 (CA 1, 8/31/99)

Defendant was tried on felony trespass, which resulted in a hung jury. The prosecutor then reduced the charge to a misdemeanor and defendant was tried without a jury.

On appeal, defendant argued he was improperly denied a jury trial. The Court of Appeals disagreed holding that once the offense became a misdemeanor, defendant was no longer entitled to a jury.

Defendant was placed on probation for six months. After he was found in violation of probation, he was sentenced to two years probation.

On appeal, defendant argued there was no statutory authority to increase the period of probation from six months to two years. The Court of Appeals disagreed.

State v. Rosario, 303 Ariz. Adv. Rep. 3 (CA 1, 8/31/99)

Defendant pleaded guilty and was sentenced on December 16, 1994. A notice of post-conviction relief had to be filed by March 16, 1995.

Defendant's notice was time stamped by the clerk of court on March 21, 1995, which was past the due date. However, the notice was dated March 9, 1995, which was within the filing period. The Court of Appeals held that for an incarcerated defendant, the notice shall be considered filed on the date the inmate delivers it to prison authorities for mailing to the court.

At the change of plea proceeding, defendant was told he was eligible for parole when he served one-half of his sentence. He actually was not eligible for any release until he served eighty-five percent of his sentence. Defendant was entitled to a hearing to determine if he based his decision to plead guilty on this misinformation.

Zuther v. State of Arizona, 303 Ariz. Adv. Rep. 34 (CA 1, 8/31/99)

Defendant was sentenced in 1992 when each inmate by statute was given $50.00 in "gate money" when discharged from prison. The statute was amended in 1993 so "gate money" was to come from the inmate's own money. The Court of Appeals held the amendment could not be applied retroactively to defendant.

In Re: JONAH T., 304 Ariz. Adv. Rep. 26 (CA 1, 9/16/99)

The Arizona Supreme Court has an administrative rule that requires a "confirmatory test by gas chromatography/mass spectrometry" before a juvenile may be found in violation of probation for drug usage. Jonah T. was found in violation without the "confirmatory test."

The Court of Appeals held noncompliance with the administrative order did not preclude admission of a positive immunoassay urine test at the probation violation hearing. Further, it was held this did not affect the juvenile court's discretion in determining the appropriate disposition.

State v. Riley, 304 Ariz. Adv. Rep. 8 (CA 2, 9/21/99)

A police officer in New Jersey was allowed to testify telephonically at a suppression hearing in Arizona. The Court of Appeals held this was proper because the confrontation clauses of the United States and Arizona constitutions provide for less protection at a suppression hearing than at trial.

Stop

The officer stopped a vehicle for speeding. The driver was shaking and sweating profusely. He had $4,000 in cash on him and gave the officer misinformation. This supported a search of defendant who was a passenger in the vehicle.

Sentencing

Defendant threatened six bank employees with deadly force to prevent their resistance to the taking of money from the bank. The Court of Appeals held defendant was guilty of six separated armed robberies because robbery "is a crime against a person, not against property." Defendant was given consecutive sentences for the offenses against each of the six bank employees. On appeal, he argued this was double punishment in violation of A.R.S. Section 13-116. The Court of Appeals noted that Section 13-116 does not apply to sentences imposed for a single act that harms multiple victims and held that here, there were multiple

acts against multiple victims.
State v. Saiers, 304 Ariz. Adv. Rep. 5 (CA 2, 9/9/99)

The Court of Appeals held no instruction should be given on the consequences of a guilty but insane defense. Punishment or "what happens after their verdict is not the jury's concern."

The opening brief cited studies suggesting that jurors have preconceived ideas about the results of an insanity verdict. The Court of Appeals held this was material outside the record on appeal and would not be considered by them.

During examination of a psychiatrist, the prosecutor asked him about past treatment of defendant. Defense counsel moved for a mistrial because the questioning implied to the jury that nothing would be gained by defendant's hospitalization and prison was the only option. The Court of Appeals upheld the trial judge's denial of the motion.

Defendant filed a petition for post-conviction relief alleging newly discovered evidence. Defendant alleged numerous charges the United States Army had brought against the victim could have been used for impeachment. The Court of Appeals held this was not newly discovered evidence because the charges were not filed until after the defendant's trial. Therefore, relief was denied.

■

Bulletin Board

New Attorneys

Nine new attorneys will comprise Russ Born's New Attorney Training class beginning October 25, 1999. They are:

Alfonso Castillo will be joining Group D. He has been an immigration attorney for the past two years. Alfonso received his B.A. in History from the University of California at Berkeley and went on to earn his J.D. at Notre Dame Law School

Joanne Cuccia comes to our office from the Superior Court of Arizona where she worked as a law clerk/bailiff. Joanne attended Arizona State University where she earned a B.A. in Justice Studies. She continued her education as Arizona State University College of Law where she earned her J.D.

Rebecca Felmly earned her B.A. in Criminal Justice at Kent State University in Kent, Ohio. She earned her J.D. at the Cleveland Marshall College of Law in Cleveland, Ohio. Rebecca previously worked as a law clerk at the Law Offices of Berkman, Gordon, Murray & DeVan in Cleveland, Ohio.

Jason Goldstein received his B.A. in Sociology from the University of Arizona. He then went on to earn his J.D. at the University of San Diego School of Law. Jason will be sworn in in December.

Sandra Hamilton received her J.D. from the Indiana University in Bloomington, Indiana following her graduation from Ball State University where she earned her B.A. in Legal Administration. Sandra has been with our office since May of 1999 as a law clerk. She will be joining Group C.

Stacy Hinkel will join Group A upon completion of training. She graduated with a degree in Liberal Studies from Northern Arizona University. She then received her J.D. from Arizona State University. Stacy served as an extern with our office in the Spring of 1999.

Greg Navazo will join Group B upon completion of training. He received his B.A. in Political Science and Spanish Literature from the University of Arizona. He received his J.D. from the Western State University College of Law in Fullerton, CA. Greg performed an internship with the Orange County Public Defender's Office.

Russell Richelsoph graduated with a B.A. in Justice Studies from Arizona State University. He then earned his J.D. at the Arizona State University College of Law. Russell was a student attorney in our office from January of 1999 until April of 1999. He will be joining Group D.

Jason Squires holds a B.A. in Finance from the University of Arizona. He earned his J.D. from the California Western School of Law in San Diego. Jason comes to our office from the U.S. District Court where he performed his internship. He will be joining Group D.

In addition to the attorney training class, the following attorneys have joined the office:

Brandon Cotto received his B.A. in Criminal Justice from Florida Atlantic University. He then earned his J.D. from New York Law School. Brandon has served as a law clerk with our office since June of 1998. He is assigned to Group A.

Rodney Mitchell has served as a law clerk with our office since May of 1998. He received his B.A. in Political Science from the US. Naval Academy in Annapolis, Maryland. He received his J.D. from Arizona State University. Rodney is assigned to Group B.

Michael Eskander has been with our office as a law clerk since July of 1998. He received his L.L. B in Law from the University of Ein Shams College of Law in Cairo, Egypt. Michael graduated from the University of Iowa College of Law where he earned his Law L.L. M. He joined Group C.

Amy Sitver joined our Juvenile Division on October 26, 1999. She received her B.A. in Broadcasting at Arizona State University. She then received her J.D. at the Gonzaga University School of Law in Spokane, Washington. Amy has worked in our office since May of 1999 as a law clerk.

Julie Michelle Stewart received her B.A. in English at the Arizona State University. She then earned her J.D. at the Arizona State University College of Law. For the past three years, Julie has worked at the Attorney General's Office in their Children and Family Protection Division. She joined our Dependency Unit on October 25, 1999.

Anders Lundin comes to our office from the Maricopa County Attorney's Office. He earned his B.A. in History from the University of Minnesota. He then earned his J.D. from the University of Arizona. Anders will be joining Group C.

New Support Staff

Lupe Hodge, Legal Secretary in Group D, started on September 7, 1999.

Christian O. Lopez, Trainee in Group E, started on September 7, 1999.

Patricia Moncaca, Legal Secretary in Group E, started on September 14, 1999.

Mark J. Gotsch, Defender Investigator, started on September 27, 1999.

Eva Bowls, Legal Secretary in Group D, started on October 6, 1999.

Jimmy Capono, Appellate Assistant Trainee, started October 18, 1999.

Connie Boyer, Client Services Coordinator, started on October 18, 1999.

Ronald Lopez, Aide for Group B, started on October 18, 1999.

Three new law clerks will be joining our office. **David A. Cutrer**, starting October 27, 1999; **Jaime Noldand**, starting October 27, 1999, and **Kara L. Geranis**, starting November 1, 1999.

Keely Reynolds will be joining our office on November 1, 1999 as the Special Projects Manager in Administration. She is coming to us from the law firm of O'Connor Cavanagh. Keely has prior experience in the criminal defense arena, having served as a long-term assistant to Attorney Peter Balkan.

Alyce "Darlene" Stearns, Appeals Secretary, starts November 1, 1999.

Adriana Luna-Rangel, Legal Secretary in Group D, starts November 1, 1999.

Mary Chessik, Investigator, begins November 1, 1999.

Adam Assaraf will join our office on November 15, 1999 as the Operations Supervisor in Administration. Adam has worked with the office as our OMB Budget Analyst throughout the last year.

Support Staff Moves/Changes

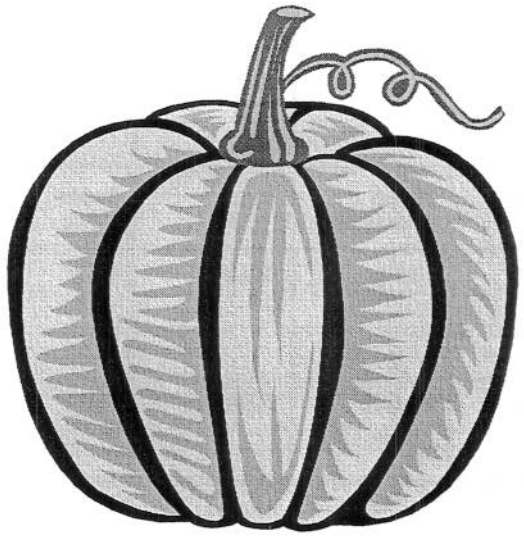
Esther Chavez (Records/Appeals) left the office on August 30, 1999.

David Fuller (Attorney) left the office on October 1, 1999.

Susan Frank (Attorney) left the office on October 8, 1999.

Shellie Smith (Attorney) left the office on October 17, 1999.

Rebecca Stoneburner (Secretary) left the office on October 19, 1999.



September 1999
Jury and Bench Trials

Group A

Dates: Start-Finish	Attorney/ Investigator Litigation Assistant	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
9/7-9/27	Zick & Parsons	Reinstein	Ditsworth	CR 98-10599 First Degree Murder/F1	Guilty	Jury
9/7-9/16	Hernandez	Dunevant	A.G. Rosen	CR 99-04376 Child Abuse/F2DCAC Manufacture Methamphetamine/F2 Poss. of Meth For Sale/F2 Poss. Of Precursor Chemicals/F3 Misconduct With Weapons/F4 Conspiracy/F2 PODP/F6	Directed Verdict on Child Abuse Guilty on all other charges	Jury
9/9-9/20	Leal & Knowles	P. Reinstein	Pittman	CR 99-06491 Agg. Assault/F4	Guilty	Jury
9/13-9/15	Wall	Gottsfield	Stasche/ Stooks-Ewing	CR 98-16623 Theft/F3 Theft/F5	Mistrial	Jury
9/16-9/20	Leal	Dunevant	Gadow	CR 98-12589 3 cts. Child Molest/F2DCAC	Ct. 1 – Not Guilty Ct. 2 – Hung 8 to 4 Not Guilty Ct. 3 – Severed before trial	Jury
9/16-9/23	Rempe/ Jones Molina	P. Reinstein	A..G. Todd	CR 98-06097 2 cts. Chop Shop/F2 3 cts. Theftt/F3	1 ct. Chop Shop -Not Guilty 2 cts. Theft – Not Guilty 1 ct. Chop Shop – Mistrial 1 ct. Theft – Guilty	Jury
9/20-9/22	Farney/ Brazinskas	Baca	Stooks-Ewing	CR 99-07470 Agg. Assault/F6N	Guilty/M1	Jury
9/27-9/28	Green	Gottsfield	Craig	CR 99-07099 IJP/M6 Criminal Damage/M6	Guilty	Jury
9/29-9/30	Klepper	McVey	Fuller	CR 99-06719 POND/F4 PODP/F6 with 2 priors	Guilty	Jury

GROUP B

Dates: Start/Finish	Attorney/ Investigator Litigation Assistant	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
8/30-9/1	McCullough/ Kasieta & Munoz Oliver	Hutt	Sorrentio	CR98-10893 Sex Conduct w/minor/F2 Sex Abuse w/minor/F2	Guilty	Jury
9/1-9/3	Agan	Schneider	Cummings	CR 99-03512 Armed Robbery/F2	Not Guilty	Jury
9/7-9/7	Kratter	Arellano	Clark	CR97-11957 Aggravated Assault/F6 Vulnerable Adult Abuse/F5	Not Guilty	Bench
9/13-9/17	Washington & Grant/ Erb Linden	Jones	Freeman	CR 99-04837 4 Cts. Child Molest/F2 DCAC 2 Cts. Sex Abuse/F3 DCAC	Not Guilty	Jury
9/21-9/22	Peterson	Katz	Bailey	CR99-05810 Aggravated Assault/F5 Resist Arrest/F6	Guilty	Jury
9/21-9/27	Bublik & Petersen-Klein/ King	Hilliard	McNalley	CR97-92071 Aggravated Assault/F3D	Guilty	Jury
9/22-9/23	LeMoine/ King	Hutt	Jones	CR 99-03165 POND/F4 PODP/F6 (with 5 priors)	Guilty	Jury
9/30-9/30	LeMoine/ King	Hutt	Jones	CR 99-03165 Aggravated Assault/F6 (with 5 priors)	Not Guilty	Jury

GROUP C

Dates: Start-Finish	Attorney/ Investigator Litigation Assistant	Judge	Prosecutor	CR# and Charge(s)	Result: w/hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
8/31/99 to 9/1/99	Burkhart & Jolley	Jarrett	Carter	CR99-92080 1Ct. Burglary 2, F3N 1 Ct. Theft, F4N 1 Ct. Theft, F6N	Not Guilty Guilty Guilty	Jury
8/30/99 to 9/2/99	Antonson	Aceto	Cook	CR99-91223 1 Ct. Agg. Robbery, F3N	Guilty	Jury
9/1/99 to 9/3/99	Nermyr & Gooday	Norman Hall	Zettler	CR99-91393 & CR99-90063 1 Ct. Armed Robbery, F2D 1 Ct. Miscd. w/weapons, F4D 1 Ct. Agg Assault, F5D	Hung Jury 11 – guilty 1 – not guilty	Jury
9/7/99 to 9/8/99	Antonson	Oberbillig	Goldstein	CR99-92562 2 Cts. Agg. Assault, F3D	Guilty of 1 Ct. Agg Assault, Dangerous; Guilty of 1 Ct. Disorderly Conduct, Dangerous	Jury
8/31/99 to 9/9/99	Klobas/ Beatty Rivera	Dairman	McCauley	CR99-90097 1 Ct. Sexual Assault, F2N 1 Ct. Burglary, F3N 1 Ct. Assault, M1	Not Guilty	Jury
8/26/99 to 9/14/99	Rosales Campos	Barker	Krabbe	CR97-94083 1 Ct. Murder 2, F1D	Defendant entered plea due to possible hung jury.	Jury
9/15/99	Antonson	Schwartz	Sampanes	CR98-95870 1 Ct. PODD, F4N 1 Ct. PODP, F6N	Guilty	Jury
9/14/99 to 9/16/99	Rossi & Lorenz/ Beatty	Aceto	Jennings	CR99-90458 1 Ct. Agg DUI, F4N 1 Ct. Agg. Assault, F6N	Guilty	Jury
9/14/99 to 9/17/99	Corbitt	Kamin	Griblin	CR99-91269 1 Ct. Agg DUI, F4N	Guilty	Jury
9/16/99 to 9/20/99	Zazueta	Ishikawa	Mark Anderson	CR99-92626 & CR99-92603 2 Cts. Unlawful Flight, F5N	Hung Hury	Jury
9/20/99 to 9/22/99	Lorenz & Burkhart	Barker	O'Niell	CR98-90916 2 Cts. Sex Conduct w/minor, F2D 1 Agg Assault, F6N	Mistrial Plead guilty to 2 Cts. Attempted sexual conduct w/minor	Jury
	Cotto Turner	Jarrett	Amato	CR97-94365 1 Ct. Murder 2, F2D	Guilty of Manslaughter, F2D	Jury

9/28/99 to 9//30/99	Sheperd	Ellis	Goldstein	CR99-92391 2 Cts. Misconduct w/weapons, F4N 1 Ct. Disorderly Conduct	Guilty Hung Jury	Jury
9/29/99 to 10/4/99	Leonard & Klopp-Bryant	Dairman	Evans	CR99-91738 1 Ct. Sexual Abuse, F5N	Guilty	Jury

Group D

Dates: Start-Finish	Attorney/ Investigator Litigation Assistant	Judge	Prosecutor	CR # and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
9/21 – 9/8/99	Ferragut	Wilkinson	Alexov	CR 99-06841 1 Ct. Agg.Asslt., F3	Dismissed w/prejudice	Jury
9/14- 9/17/99	Merchant & Hamilton Fairchild	D'Angelo	Cottor	CR99-09017 1 Ct. Agg. Asslt/F2, DCAC 2 Ct. Agg. Asslt/Dang., F3	Not Guilty all three Agg. Asslts. But Guilty on 1 Ct. Prohibited Possessor, F4 (With 2 Priors)	Jury
9/1-9/8/99	Ferragut	Dougherty	Alexov	CR99-06841 1 Ct. Agg. Asslt./F4	Dismissed with Prejudice	Jury
8/10 – 8/13/99	Ferragut	Reinstein	Bailey	CR99-07392 1 Ct. Armed Robbery With 2 Priors (Dangerous)	Not Guilty	Jury
9/7/99	Enos	Dougherty	Naber & Clarke	CR 99-07096 2 Ct Agg. Asslt 1 Ct. Resist Arrest PODD PODP	Not Guilty 2 Cts Agg Asslt Guilty on Resist Arrest Guilty on PODD Guilty on PODP	Jury
9/7 – 9/9/99	Silva	Gerst	S. Tucker	CR 99-07393 Theft/ F5 Theft Stolen Vehicle/F3	Guilty Theft Stolen Vehicle Lesser to F6 on Theft	Jury
9/16 – 9/19/99	Silva	Gerst	L. Horn	CR 99-03479 2 Cts. Child Molest	Not Guilty both counts	Jury
9/23 – 9/24/99	Silva	Dunevant	Perry	CR 98-17457 1 Ct. Forgery/F4 Offer False Instrument for Filing/F6	Guilty	Jury
9/1/99	Schaffer	D'Angelo	Adleman	CR 99-05535 Theft-Stolen Vehicle/F3	Dismissed before trial	Jury
9/6/99	Schaffer/ Barwick	Gerst	T. Clarke	CR 98-14253 Child Stealing/ Custody Interfer./ F4	Guilty	Bench

Group E

Dates: Start/Finish	Attorney/ Investigator Litigation Asst	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
8/30-9/2	Huls	Sheldon	Jones	CR99-06343 Armed Robbery/F2	Hung Jury (4-4)	Jury
9/7-9/9	Porteous/ Souther	Jones	Frick	CR99-07370 Att.Armed Robb./F3D Agg. Asslt./F4 w/prior	Not Guilty on Att. Armed Robbery Agg. Asslt. was dismissed morning of trial.	Jury
9/9-9/14	Reinhardt	Jones	Cummings	CR99-06355 SOND/F2 POND/F4 PODP/F6 w/8 priors	Guilty on POND & PODP Guilty of Lesser SOND/F4	Jury
9/14-9/16	Rock	Baca	Daiza	CR99-04281 Agg. Asslt./F2D	Guilty	Jury
9/15-9/16	Huls	Hilliard	Clarke	CR99-04346 Theft of Means of Transp./F3 PODD/F4	Not Guilty of Theft of Means of Transp. PODD pled to court prior to trial.	Jury
9/21-9/22	Roskosz	Reinstein	Adams	CR99-08991 Agg. Robbery/F3	Guilty of Lesser-Included Robbery/F4	Jury
9/21-9/22	Bond/ Souther	Hutt	Cummings	CR99-03932 SOND/F2	Hung Jury	Jury
9/20-9/29	Brown/ Erb Oliver	Arellano	Sorrentino	CR98-10885 7 Cts.Child Molest/F2 2 Cts.Sex. Cond.w/minor/F2	Guilty 7 Cts. Child Molest & 1 Ct. Sex. Cond. w/minor Not guilty 1 Ct. Sex. Cond. w/minor	Jury

*
Arizona State Bar # *
Deputy Public Defender
11 West Jefferson, Suite 5
Phoenix, Arizona 85003
(602) 506-*
Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. *, Defendant.	No. CR *-* **MOTION TO PRECLUDE GOVERNMENT WITNESS' EXPERT TESTIMONY** (HONORABLE *) (ORAL ARGUMENT REQUESTED)

Defendant, *, moves this Court to preclude government witness, *, from testifying as to his/her opinion regarding the English translation of Defendant's statements in Spanish. Such testimony would require that the witness first be qualified as an "expert." However, the witness lacks the education, training and experience necessary to render an expert opinion on this subject. The Court must therefore preclude witness testimony regarding Defendant's statements.

Respectfully submitted this * day of *, 1999.

Maricopa County Public Defender

By_____
*
Deputy Public Defender

STATEMENT OF LAW

"If . . . specialized knowledge will assist the trier of fact to understand the evidence . . . a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto . . ."

"An expert is one whose opinions are based on special knowledge acquired through experience or careful study which is unknown to people in general."

I. LANGUAGE TRANSLATION IS "SPECIALIZED KNOWLEDGE" REQUIRING EXPERT TESTIMONY.

An *accurate* translation of Defendant's statements during interrogation would indeed be "specialized knowledge." Not all people speak both Spanish and English fluently, proficiently, or even at a basic level. Therefore, such translation would indeed be "specialized."

Arizona case law also states clearly that *court* interpretation requires expert qualification, and there is nothing to suggest that the standards for witnesses testifying as to language translation should be any different. "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation."

II. THE WITNESS IS NOT QUALIFIED AS AN EXPERT BY KNOWLEDGE, SKILL, EXPERIENCE, TRAINING OR EDUCATION.

The fact that a person may deal with a subject in such a manner that it makes him more knowledgeable than the average citizen does not necessarily make him such an expert that it is an abuse of discretion to refuse to allow him to testify. This witness may have some translation abilities, and may even be "more knowledgeable than the average citizen." But this is insufficient. In view of the importance of an accurate translation of Defendant's statements, the Court must hold any witness testifying as an interpreter to a high standard; i.e. higher than a "more knowledgeable than the average citizen" standard. In applying the appropriate standard, it is clear that the witness is not qualified to testify as an expert. On *, defense counsel interviewed the witness concerning their qualifications to translate, and tested their ability to do so. On *, defense counsel submitted a tape of the interview to the Office of the Court Interpreter (OCI). Court Interpreter * has listened to this tape, and has informed defense counsel that the witness is not qualified as an expert.

III. BECAUSE THE WITNESS IS NOT QUALIFIED AS AN EXPERT, THE COURT MUST PRECLUDE THE WITNESS FROM TESTIFYING AS TO DEFENDANT'S ALLEGED STATEMENTS.

"If . . . specialized knowledge will assist the trier of fact to understand the evidence . . . a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto . . ." Thus, only when a witness is "qualified," may a court consider allowing the person to testify as an expert.

Further, State v. Burris holds that whether a person is qualified as a *court* interpreter is a matter resting within the discretion of the trial court. Again, there is nothing to suggest that the standards should be any less for a witness claiming to be an expert interpreter.

In fact, case law states that admission of *any* expert's testimony is left to judicial discretion. See State v. Kevil, (admission of expert testimony is a question within the sound discretion of the trial court and will not be altered absent a showing of prejudicial abuse of that discretion), State v. Mosley, (whether a particular witness possesses sufficient qualifications to qualify as an expert is within the trial court's discretion and such determination will not be upset on appeal in the absence of a clear abuse of discretion) and State v. Bauer, (same holding as Mosley).

Therefore, in view of the witness's deficiencies as an interpreter, the Court must properly exercise its considerable discretion, and find that the witness is not qualified as an expert.

CONCLUSION.

For the foregoing reasons, Defendant respectfully requests that witness * be precluded from testifying as to Defendant's statements.

Respectfully submitted this * day of *, 1999.

Maricopa County Public Defender

By_____
*
Deputy Public Defender

Upcoming Seminar:

Annual Death Penalty Seminar

December 9 & 10, 1999
Quality Hotel & Resort
3600 North 2nd Avenue
Phoenix, AZ

Registration materials will be arriving soon.

May qualify for up to 12.25 CLE hours.

Sponsored by
Maricopa County Public Defender's Office